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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-503

BILLY D. COOK, et al., Petitioners

v.

ROGER W. HUDSON, et al., Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO FILE SUPPLEMENTAL BRIEF

Oral argument on this case was heard on November 1. On that day a motion to reconsider the denial of the National Education Association's motion to participate as amicus was granted. This presentation, as contrasted with that of the respondents, argues that the case should be dismissed as an improvident grant. Inasmuch as petitioners had no opportunity to file a reply brief on this issue prior to argument and in light of the fact that a significant portion of the Court's time was spent during oral argument discussing the issue, petitioners now request leave of Court to file a brief limited to the issue of utilizing the improvident grant technique to dispose of the case.

Respectfully submitted,

George Colvin Cochran

George Colvin Cochran
Counsel for Petitioners

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SUPPLEMENTAL BRIEF

Petitioners in this case were terminated from their positions following the 1972-73 school year. Subsequent to that event and following the United States District Court decision, the Mississippi Legislature enacted the following statute:

> The governing authorities of every school district in this state are hereby prohibited from denying employment to any person as a superintendent, principal or teacher . . . or as a noninstructional personnel . . . for the single reason that any eligible child of such person does not attend the school system in which such superintendent, principal, teacher, or noninstructional personnel is employed. [MISS. CODE ANN. § 37-9-59 (March 27, 1974)]

With respect to this provision as it relates to the procedural posture of the instant case petitioners bring the following to this Court's attention:

(1) This is a damage suit claiming back pay. Passage of the statute in no way affects damages accrued up to the point of enactment and therefore any claims with respect to mootness are misplaced.

(2) Pursuant to advice of counsel, petitioners have not applied for reemployment in the period subsequent to enactment of the statute. This decision was made in the context of the District Court and Court of Appeals opinions and the unaltered position of respondent (argued before the Fifth Circuit and now this Court) that the policy as applied to children attending private segregated academies was sustainable. Counsel for respondents' statement on oral argument that applications for reemployment made by petitioners at this time would only be "considered" bears out the conclusion that under the new statute a portion of the relief requested, i.e., reinstatement, would not be forthcoming. Assuming the correctness of the foregoing it may also be concluded that applications by teachers having children in private segregated schools are currently not being considered by Calhoun County officials.

(3) The claims of petitioners relating to reinstatement and back pay as well as the serious constitutional issue raised with respect to the termination of their employment obviously make this case a poor candidate for the label of "abstractly . . . intellectually interesting" of purely "academic" nature under Rice v. Sioux City Mem. Park Cemetary, Inc., 349 U.S. 70, 74. Specifically, this case presents a clear, solid constitutional issue with each party continuing to maintain diametrically opposed positions after passage of the statute in question. Even more important, a cursory reading of the Fifth Circuit opinions rendered by Judges Coleman and Roney reveal that, in addition to dealing with the specific issue of public school teachers with children attending private schools, work from a constitutional premise that all school board regulations meeting a "reasonableness" standard outweigh the incurred loss of protected constitutional rights. In this context, the issue raised transcends events leading to petitioners' termination. As stated by Judge Clark in dissent below:

> Today's case is cast in the appealing garb of reinforcing public school desegregation by suppressing the right to educate one's child in a segregated private school. The problem is that the decisional principle it establishes applies to all forms of personal association from the Ku Klux Klan to Black Panthers, and from membership in the Citizens Counsel to membership in the NAACP. Another such victory, bought at the expense of surrendering constitutionally protected rights to the expertise of psychological opinion, and we are undone. [Pet. App. 28a]

The concept of Equal Justice Under Law demands that the petitioners' have their case decided on the merits. This Court's responsibility to the Constitution and this country requires no less.

Respectfully submitted,

George Colvin Cochran

George Colvin Cochran
Attorney for Petitioners